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No. 99-1442

IN THE
Supreme Court of the United States
OCTOBER TERM, 1999

CITIZENS FOR BALANCED TRANSPORTATION, *ET AL.*

Cross-Petitioners,

v.

CAROL M. BROWNER, ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION AGENCY, *ET AL.*,

Cross-Respondents.

ON PETITION FOR WRIT OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF IN OPPOSITION OF RESPONDENTS AMERICAN TRUCKING ASSOCIATIONS, INC., CHAMBER OF COMMERCE OF THE UNITED STATES, *ET AL.**

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DISCLOSURE STATEMENT

Respondents are: American Trucking Associations, Inc., Chamber of Commerce of the United States, National Coalition of Petroleum Retailers, Burns Motor Freight, Inc., Garner Trucking, Inc., Genie Trucking Line, Inc., National Automobile Dealers Association, National Association of Manufacturers, National Small Business United, The American Portland Cement Alliance, The Glouster Company, Inc., Non-Ferrous Founders' Society, Equipment Manufacturers Institute, American Farm Bureau Federation, and American Road and Transportation Builders Association.

None of these respondents (collectively "ATA") has any parent corporations, and no publicly traded company owns 10 percent or more of any of these respondents' stock.

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INTRODUCTION

The Court should deny the cross-petition filed by Citizens for Balanced Transportation, *et al.* ("CBT") because it has no bearing on the important statutory interpretation questions presented in the Government's first question and ATA's cross-petition. CBT raises only collateral factual matters – matters that are mere alternative grounds for invalidating EPA's 1997 air-quality rules, would have no immediate impact on EPA's administration of the Clean Air Act ("CAA" or "Act"), are based primarily on misrepresentations of the record, and were not even squarely addressed below. To grant review of CBT's unworthy petition would serve only to further complicate what, if the Court elects to review the decision below, would already be an extraordinarily complex case.

COUNTERSTATEMENT OF THE CASE

ATA provided a full and appropriate statement of the case in its brief in opposition to the Government's petition. By contrast, CBT's so-called "statement of the case" largely defies rebuttal in light of its sheer length (23 pages) and penchant for exaggeration. This counterstatement is accordingly limited to the two most important points CBT raises: the Environmental Protection Agency's ("EPA's" or "the Agency's") rejection of CBT's factual arguments regarding the proper level of the 24-hour primary National Ambient Air Quality Standard ("NAAQS") for fine particulate matter ("$PM_{2.5}$"); and EPA's rejection of CBT's ultimately factual arguments regarding the proper level of the secondary NAAQS for $PM_{2.5}$.

The gist of CBT's argument on the first point is that a Risk Assessment ("RA") prepared by an outside consultant for the Agency "unequivocally demonstrated" that the primary standard selected by EPA is insufficient. *See* CBT Pet. at 7; *see also id.* at 5-6. CBT asserts further that the Administrator "provided no candid discussion of the results of her RA in the final rule," but instead "disingenuously dismissed with a single sentence the evidence from her RA." *Id.* at 6, 7.

In fact, the Administrator discussed at length the various risk assessments in the record, and explained that these "quantitative risk estimates include significant uncertainty and, therefore, *should not be viewed as demonstrated health impacts*." 62 Fed. Reg 38,652, 38,656 (1997) (emphasis added). Indeed, "the inherent scientific uncertainties are too great to support standards based on the lowest concentrations measured in such studies." *Id.* at 38,675. The Agency's Clean Air Scientific Advisory Committee agreed: "[C]urrently the risk assessments are of limited value . . . ." JA(PM) 3163. Based on this record, and its invalidation of EPA's air-quality standards on other grounds, the D.C. Circuit unanimously deemed CBT's arguments unworthy of discussion in its published opinion. No D.C. Circuit judge voted to grant CBT's petition for rehearing on this issue.

With respect to the secondary NAAQS, CBT claims that "EPA admitted that the level of the standard would continue to allow adverse effects on . . . visibility." CBT Pet. at 3. In reality, the Agency concluded that the secondary standard *would* remedy such adverse effects *when considered "in conjunction with" additional regional programs*. *See* 62 Fed. Reg. at 38,679 (emphasis added). EPA explained that reliance on regional programs (in addition to the secondary NAAQS) is appropriate in light of natural differences in visibility across the various regions of the nation. *See id.* at 38,679-82. Indeed, a NAAQS "intended to maintain or improve visibility conditions [in] . . . parts of the West would have to be set at or even below natural background levels in the East . . . ." *Id.* at 38,680.

The court of appeals unanimously determined that it "need not reach the main thrust of the petitioners' challenge to the secondary NAAQS" because it was already remanding that NAAQS based on the statutory interpretation questions presented in the Government's petition and ATA's cross-petition. U.S. App. at 56a. No D.C. Circuit judge voted to rehear this issue either.

On the same day that EPA issued its air-quality rules, the President ordered the Agency to address the "remain[ing] scientific uncertainties" by "promptly initiat[ing] a new review" of the primary and secondary $PM_{2.5}$ standards. 62 Fed. Reg. 38,421, 38,427 (1997). The President stressed that EPA must conclude this review by July 2002, and must not "impos[e] . . . any new controls related to the $PM_{2.5}$ standards" before that time. *Id.* Shortly thereafter, Congress made this pledge binding by enacting legislation delaying implementation of the revised $PM_{2.5}$ NAAQS until $PM_{2.5}$ monitors have been put in place and three years' worth of data have been gathered. *See* Transportation Equity Act for the 21st Century, Pub. L. No. 105-178, § 6102, 112 Stat. 107 (1998). Those events cannot possibly occur anytime before the presidentially mandated review is complete in 2002.

REASONS FOR DENYING THE WRIT

I. ON THEIR FACE, THE FIRST TWO QUESTIONS ARE UNWORTHY OF *CERTIORARI*.

CBT's first two questions do not even pretend to satisfy this Court's criteria for *certiorari*. The first question asserts that EPA did not "'articulate a satisfactory explanation for its action'" in light of the record evidence, while the second asserts that the 24-hour primary standard is contrary to that record evidence. Both those questions involve one-case-only issues that are facially unworthy of review. As this Court has often stated, it "do[es] not grant *certiorari* to review evidence and discuss specific facts." *United States v. Johnston*, 268 U.S. 220, 227 (1925). Indeed, protecting the Court's scarce resources against dissipation in fact-bound cases is of sufficient importance that the practice of denying *certiorari* in such cases has been codified in the Court's rules: "A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." Sup. Ct. R. 10. The Court thus will "'intervene only in what ought to be the rare instance when the

[legal] standard appears to have been misapprehended or grossly misapplied.'" *Mobil Oil Corp. v. FPC*, 417 U.S. 283, 310 (1974) (emphasis added) (quoting *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 491 (1951)).

This case surely is not the highly exceptional case in which Supreme Court review of factual evidence is warranted. CBT itself appears to sense as much, as it offers a conclusory statement that CBT is also seeking "a writ addressed to the proper standard for review that the court of appeals should have applied." CBT Pet. at 26. But that statement is mystifying. The D.C. Circuit's extensive opinion, far from applying an incorrect standard of review, chose not to address CBT's meritless factual contentions at all.

Moreover, because the court of appeals *remanded* the EPA rules that CBT challenges, CBT's petition presents only alternative grounds for affirmance of the judgment below. Those grounds might theoretically become relevant *if* EPA employs similar reasoning on a similar record on remand. But that entirely hypothetical turn of events could occur several years from now at the very earliest, given that Congress and the President have effectively precluded EPA from implementing *any* revised $PM_{2.5}$ NAAQS before 2002, regardless of what action, if any, this Court might take. *See supra*, at 3. In the meantime, there clearly is no need for this Court to consider CBT's claims. *See, e.g.*, Robert L. Stern, *et al.*, *Supreme Court Practice* § 4.16, at 196 (7th ed. 1993) (interlocutory *certiorari* proper only for "important and clear-cut issue of *law* that is fundamental to the further conduct of the case") (emphasis added; citing cases).

CBT's extravagant assertion that this Court should nonetheless grant *certiorari* because "millions of children, the elderly, and [others] are at significant risk," CBT Pet. at 25, is also spurious. As noted in other filings in this case, the record evidence simply does not support such assertions of a looming health crisis. *See, e.g.*, ATA Brief in Response at 4-7. Even if it did, however, Congress and the President have authoritatively

prohibited EPA from responding. CBT's first two questions therefore present issues that not only are purely factual and record-based, but also are, by law, of little or no real-world importance. Such issues clearly do not warrant this Court's attention.

II. THE THIRD QUESTION IS EQUALLY UNWORTHY OF *CERTIORARI*.

Although CBT packages its third question as a legal issue, that question too is ultimately fact-based and entirely unworthy of review. CBT's third question requests that this Court consider whether "EPA may establish secondary national ambient air quality standards for $PM_{2.5}$ that fail to protect against *all* known or anticipated adverse effects on public welfare, including visibility." CBT Pet. at i (emphasis added).

Even assuming that this question is a properly framed legal issue, it plainly fails the criteria for *certiorari*. *First*, the court of appeals' decision undisputedly does not conflict with decisions of this Court, another court of appeals, or even another panel of the D.C. Circuit. *Second*, this issue was decided unanimously by the D.C. Circuit and attracted no interest by any member of that court on rehearing. *Third*, far from being a matter of exceptional importance, the protections of the *secondary* NAAQS are by definition *not* "requisite to protect the public health" – the primary purpose of the statutory protections of the Clean Air Act. *See* CAA § 109(b)(1, 2), 42 U.S.C. § 7409(b)(1, 2).

The court of appeals largely restricted itself to CBT's technical argument that EPA has "no discretion to decide that some visibility impairment is better remedied through [a] program" other than the secondary NAAQS, while declining to reach "the main thrust of [CBT's] challenge" because it had invalidated the secondary NAAQS on other grounds. U.S. App. at 56a, 57a. CBT's third question therefore seeks *certiorari* so that this Court may consider alternative grounds for affirmance not fully considered below. Likewise, as with

CBT's first two questions presented, the President and the Congress have delayed implementation of the NAAQS at issue – the secondary $PM_{2.5}$ NAAQS – guaranteeing that any decision by this Court will be devoid of real-world impact for years to come.

But in addition to flunking the Court's traditional criteria for *cert*-worthy legal issues, CBT's supposed legal claim simply makes no sense. On one hand, CBT argues that EPA must remedy "*all* adverse visibility effects through promulgation of the secondary NAAQS," rather than "through other means." CBT Pet. at 24 (emphasis added). On the other hand, it contends that Section 169A, a subsequently-enacted provision of the Act, "aims higher than the NAAQS" by requiring EPA to impose *additional* visibility restrictions in certain specific areas. *See id.* at 29 (citing CAA § 169A, 42 U.S.C. § 7491). But if CBT's interpretation of the secondary NAAQS provisions were correct, "all adverse visibility effects" would be required by law to be remedied by the secondary NAAQS, and there would be no "additional" protection for Section 169A or any other law to provide. CBT thus reads section 169A as a statutory nullity – in contravention of the fundamental canon that statutes must be read as a whole so as to give meaning to each of their parts. *See Mountain States Tel. & Tel. Co. v. Pueblo of Santa Ana*, 472 U.S. 237, 249 (1985).

Not surprisingly, CBT ultimately retreats to yet another purely factual contention – namely, that EPA's Section 169A program will prove insufficient to remedy adverse visibility effects. *See* CBT Pet. at 28 (claiming "there is absolutely no evidence in the record to support EPA's assumption that the regional haze program will eliminate adverse effects on visibility"). That factual contention, like CBT's other two factual claims, is one that the court of appeals specifically declined to reach. *See* U.S. App. at 56a. And besides being incorrect, *see* 62 Fed. Reg. at 38,681-82, it is no more worthy of *certiorari* than the other two unworthy issues that CBT also presents.

CONCLUSION

There is no reason to complicate this case by granting *certiorari* on collateral, fact-bound, and ultimately meritless issues that generated no controversy below and will have no practical effect for years to come. This Court should deny CBT's cross-petition.

Respectfully submitted,

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